INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	4
Specification of errors to be urged	8
Summary of argument	9
Argument:	
I. The taxed transfer was a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932 and the Regulations	12
A. The transfer, pursuant to the antenuptial agreement, is "deemed a gift" to the extent that it was not supported by "an adequate and full consideration in money or money's worth"	14
B. Implicit in the decision of the Tax Court is a finding that the transfer was "donative", but if the court below properly considered an express finding to that effect essential, it should have remanded the case to the Tax Court	23
II. Taxpayer failed to prove that he received any adequate and full consideration in money or money's worth for the gift, and accordingly, the entire value of the property transferred is taxable	27
A. Taxpayer failed to prove the value of the consideration	28
B. The detriment suffered by Mrs. More cannot, as a matter of law, constitute "adequate and full consideration in money or money's worth"	33
III. Sections 501 and 503 of the Revenue Act of 1932, as construed by the Tax Court, are constitutional	37
Conclusion	40

623289—44——1

CITATIONS

Cases:

	Page
Archbold v. *Commissioner*, 42 B. T. A. 453	32
Barclay & Co. v. *Edwards*, 267 U. S. 442	38
Commissioner v. *Bristol*, 121 F. 2d 129	22, 34
Commissioner v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641	17, 35
Commissioner v. *Montague*, 126 F. 2d 948	13
Commissioner v. *Scottish-American Investment Co.*, decided December 4, 1944	25, 26, 31
Couzens v. *Commissioner*, 11 B. T. A. 1040	30
Dobson v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231	25
Douglas v. *Commissioner*, 322 U. S. 275	17
Fulton Oil Co. v. *Commissioner*, 81 F. 2d 330	26
Glaser v. *Commissioner*, 69 F. 2d 254, certiorari denied, 292 U. S. 654	36
Gray, Estate of v. *Commissioner*, 44 B. T. A. 545	36
Guggenheim v. *Helvering*, 117 F. 2d 469, certiorari denied, 314 U. S. 621	32
Guggenheim v. *Rasquin*, 312 U. S. 254	31
Helvering v. *Amer. Dental Co.*, 318 U. S. 322	21
Helvering v. *City Bank Co.*, 296 U. S. 85, rehearing denied, 296 U. S. 664	38
Helvering v. *Rankin*, 295 U. S. 123	26
Helvering v. *Taylor*, 293 U. S. 507	32
Helvering v. *Winmill*, 305 U. S. 79	17
Housman v. *Commissioner*, 105 F. 2d 973, certiorari denied, 309 U. S. 656	31
Jones v. *Commissioner*, 1 T. C. 1207	22
Lasker v. *Commissioner*, 138 F. 2d 989	22, 23
Latty v. *Commissioner*, 62 F. 2d 952	36
Levitt & Sons v. *Nunan*, 142 F. 2d 795	26
Merrill v. *Fahs*, No. 126, October Term, 1944	22
Nicol v. *Ames*, 173 U. S. 509	38
Robinette v. *Helvering*, 318 U. S. 184	14, 18, 23
Rosenthal v. *Helvering*, 124 F. 2d 474	26
Sanford, Estate of, v. *Commissioner*, 308 U. S. 39	39
Smith v. *Shaughnessy*, 318 U. S. 176	14
Taft v. *Bowers*, 278 U. S. 470	38
Taft v. *Commissioner*, 304 U. S. 351	15, 17, 36
Tyler v. *United States*, 281 U. S. 497	38
United States v. *Hudson*, 299 U. S. 498	38
Universal Steel Co. v. *Commissioner*, 46 F. 2d 908	31

Statutes:	Page
Internal Revenue Code, Sec. 1002 (26 U. S. C. 1002)	17
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 320	14, 35
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 501	2, 14
Sec. 503	3, 15
Miscellaneous:	
H. Rep. No. 708, 72d Cong., 1st Sess., pp. 27–29 (1939–1 Cum. Bull. (Part 2) 457, 476, 477–478)	14, 17, 35
II Paul, *Federal Estate and Gift Taxation:*	
Sec. 16.14	18, 36
Sec. 16.15	18
S. Rep. No. 665, 72d Cong., 1st Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 496, 524, 525)	14, 17
Treasury Regulations 79 (1933 ed.):	
Art. 8	16
Treasury Regulations 79 (1936 ed.):	
Art. 1	3, 15
Art. 8	3, 15, 17, 18
Art. 19, as amended by T. D. 4901, 1939–1 Cum. Bull. 341	30
Treasury Regulations 103, Sec. 19.22 (b) (3)–1	22
Treasury Regulations 108, Sec. 86.8	17

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 629

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM H. WEMYSS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinions in the Tax Court (R. 8–18) are reported in 2 T. C. 876. The opinion of the Circuit Court of Appeals (R. 52–58) is reported in 144 F. 2d 78.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 24, 1944 (R. 52). Petition for a writ of certiorari was filed on October 23, 1944, and granted December 4, 1944 (R. 58). Jurisdiction of this Court rests on Section 240 (a)

of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a transfer by taxpayer to his prospective wife, pursuant to an antenuptial contract, was a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932 and the applicable Treasury Regulations.

2. If so, whether the value of the gift was the full value of the property, as held by the Tax Court.

3. Whether Sections 501 and 503, if construed as applicable to this transfer, violate the Due Process Clause of the Fifth Amendment.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 501. IMPOSITION OF TAX.
>
> (a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift.
>
> (b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *
>
> * * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Treasury Regulations 79 (1936 Ed.):

ART. 1. *Imposition of tax.*— * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) * * *

ART. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction

which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

STATEMENT

Sometime prior to May 24, 1939, taxpayer, a widower, then approximately fifty-nine years old (R. 21), proposed marriage to Ellen Stokes More, a widow, forty-four years of age (R. 9, 10). He had two children by his first marriage (R. 9), and she had one child by her first marriage (R. 9). Mrs. More's first husband had set up trusts the income from which was to be paid to her for life for her benefit and that of their infant son. One-half of the income in these trusts was treated as received by Mrs. More for her own use and an equal amount for the benefit of the child. (R. 9–10.) From her husband's death until June 20, 1939 (the date of Mrs. More's marriage to taxpayer), Mrs. More received $29,428.49 for her own use (R. 9–10). In the event of remarriage, she was to lose her part of this trust income, which would then inure entirely to the benefit of her son (R. 9, 11). Mrs. More told taxpayer she would not be willing to marry him and lose her life income under these trusts created

by her first husband unless he would enter into an antenuptial agreement with her to make good the loss, and on May 24, 1939, they entered into the following agreement in writing (R. 10):

> This contract and agreement entered into by and between William H. Wemyss and Ellen Stokes More, both residents of Davidson County, Tennessee:
>
> WITNESSETH THAT:
>
> WHEREAS, the said Ellen Stokes More has promised to marry William H. Wemyss on June 20, 1939; and,
>
> WHEREAS, upon the consummation of said marriage, under the terms of a trust now being administered by the Girard Trust Company of Philadelphia, Pennsylvania, the said Ellen Stokes More will be deprived of a large monthly income; and
>
> WHEREAS, it is the desire and intention of the said William H. Wemyss to compensate said Ellen Stokes More for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life; and
>
> NOW, THEREFORE, I, William H. Wemyss, have this day transferred in blank and delivered to the said Ellen Stokes More thirteen thousand one hundred and thirty nine (13,139) shares of the common capital stock of the General Shoe Corporation evidenced by the following certificates:

Certificate No.	No. Shares
6,001	472
6,495	231
844	900
840	1,000
839	1,000
837	9,536

In testimony whereof we, William H. Wemyss and Ellen Stokes More, have hereunto affixed our signatures.

This May 24th, 1939.

(Signed) WILLIAM H. WEMYSS
(Signed) ELLEN STOKES MORE

The contract was prepared by Mrs. More's father, who was an attorney (R. 22). On the same day, taxpayer transferred the shares to Mrs. More and less than a month later the marriage took place (R. 11). The undisputed value of the stock which taxpayer transferred to Mrs. More was $149,456.13 (R. 9, 11); while the Tax Court held that taxpayer had failed to prove the value of Mrs. More's life interest in the trusts created by her first husband (R. 15–16), on taxpayer's own claim the present value of her interest in these trusts did not exceed $77,500 (R. 12).

On the wedding day, June 20, 1939, and immediately following the marriage, taxpayer executed a will providing an estate for life or widowhood for his wife in a certain farm and for one-third of his estate, less the value of 11,139 shares of common stock of General Shoe Corporation, to be held in trust for her (R. 11). The day follow-

ing the marriage the antenuptial agreement was recorded in the Registrar's Office of Davidson County, Tennessee (R. 10–11).

The Commissioner determined that the transfer of the 13,139 shares was not made for a consideration in money or money's worth and constituted a gift of an amount equal to the value of the stock, namely, $149,456.13 (R. 11). Deficiencies were assessed for the taxable years 1939 and 1940 in the amount of $12,995.66 and $3,965.20, respectively (R. 9). The 1940 deficiency assessment followed from the increase in "the amount of net gifts for preceding years" (R. 5) consequent upon the 1939 determination.

The Tax Court found that the only consideration received by taxpayer for the transfer of the stock was the promise of marriage. It held that since, pursuant to Section 503 of the Revenue Act of 1932 and Article 8 of Treasury Regulations 79, this was not measurable in money or money's worth, it must be disregarded (R. 13, 14), and that within the meaning of this statute and regulations the entire value of the transfer was taxable as a gift. The Tax Court further held that if it be assumed that the loss by Mrs. More of the income of the trust was a consideration for the transfer of the stock rather than a mere consequence of the marriage, taxpayer's contention must fail because (a) he did not receive the income of the trusts nor acquire any right to it and (b) in any event, the actual value of Mrs. More's interest under the

trusts was not proved (R. 15–16). Finally, Section 503, as construed by the Treasury Regulations, was held, contrary to taxpayer's contention, not to be violative of the Fifth Amendment to the federal Constitution (R. 14–15). Accordingly, the Commissioner's determination was sustained. The decision was reviewed by the entire Tax Court, Judge Disney alone dissenting because of the (R. 18) "financial detriment suffered by the wife-to-be, as a consideration which in my opinion the law requires us to take into account." He did not, however, dispute that the excess in value of the stock transferred constituted a taxable gift (R. 16–18). The court below reversed the decision of the Tax Court and held that no tax whatsoever was due (R. 52–58).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the transfer by taxpayer to his prospective wife was not a gift within the meaning of Sections 501 and 503 of the Revenue Act of 1932.

2. In assuming jurisdiction to make a finding of fact that the transfer was not donative when the Tax Court had not so found and when the facts found by the Tax Court were to the contrary.

3. In holding that the financial detriment sustained by the transferee, from which the estate of taxpayer derived no financial benefit, consti-

tuted consideration within the meaning of Section 503 of the Revenue Act of 1932.

4. In holding that the excess in money value between property which taxpayer conveyed to his prospective wife and the detriment which she sustained upon becoming his wife need not be calculated, under Section 503 of the Revenue Act of 1932.

5. In holding that the excess in money value between property which taxpayer conveyed to his prospective wife and the detriment which she sustained upon becoming his wife is not taxable under Section 503 of the Revenue Act of 1932.

6. In holding immaterial the ruling of the Tax Court that taxpayer had failed to prove the actual money value of his prospective wife's interest in the trust income which she surrendered upon her marriage.

7. In reversing the decision of the Tax Court.

SUMMARY OF ARGUMENT

I

A. The court below improperly construed Sections 501 and 503 of the Revenue Act of 1932. The circumstance that the transfer was made bona fide, pursuant to an enforceable contract at common law, or for consideration of money value, does not preclude a taxable gift, since the gift tax is not confined to transfers of something for nothing. Contrary to the holding of the court

below, Section 503 means that valuable consideration in money's worth does not negative a gift motive to the extent that the value of the property transferred exceeds the value of the consideration. The statute thus contemplates that an antenuptial transfer for less than an adequate and full consideration in money or money's worth shall be deemed a gift to the extent of the amount by which the value of the property transferred exceeds the value of the consideration. Treasury Regulations 79, Article 8, long continued and having the force of law, recognizes the distinction between such transfers and transfers made in the ordinary course of business. Not only was the transaction here not made in the ordinary course of business, but it was not a bargain at all. It was merely a family arrangement. A donative intent is implicit in such arrangements and the only pertinent inquiry is whether the transfer was made for a full and adequate consideration in money or money's worth. To the extent that it was not so made, the excess in value is deemed a gift.

B. Even if the court below was correct in its view that a finding of donative intent is essential, there is implicit in the findings and opinion of the Tax Court its view that this transfer was donative. There is a substantial basis in the evidence for such a view. The court below, consequently, intruded on the province of the Tax Court in

holding to the contrary. In any event, if the Tax Court should have made an express finding as to the donative nature of the transfer, the case should have been remanded to accord to the Tax Court an opportunity to make such a finding.

II

A. The Tax Court correctly ruled that taxpayer failed to prove the money value of his prospective wife's interest under the trusts created by her former husband, namely, the earning power of closely owned stock for the life expectancy of a woman 44 years of age. No adequate proof was offered and readily available proof was not adduced. The Tax Court did not abuse its discretion, as a fact trier, in refusing to base a finding upon speculation and conjecture and without foundation in the evidence.

B. In any event, the loss of trust income cannot, as a matter of law, constitute "adequate and full consideration in money or money's worth" within the meaning of the statute, since the alleged consideration consists of a detriment on the part of transferee without return to taxpayer of any equivalent in money or money's worth. The purpose of this section in the gift tax law and similar language in sections of the federal estate tax law is to prevent the depletion of the transferor's estate, unless the tax is paid on the transfer, by requiring that the transferor receive in exchange something of the same money value.

III

Sections 501 and 503 do not violate the Fifth Amendment to the Constitution. No contention is or could be made that Congress could not constitutionally impose a transfer tax on this transfer. The problem is solely one of classification. Clearly, a transfer to a prospective wife which is not made for an adequate and full consideration in money or money's worth is sufficiently like a common law gift to be classified with such gifts. Congress may adopt a measure reasonably calculated to prevent avoidance of gift and estate taxes. Since the means here adopted are appropriate to the end, the test of validity with respect to due process of law is satisfied.

ARGUMENT

I

THE TAXED TRANSFER WAS A GIFT WITHIN THE MEANING OF SECTIONS 501 AND 503 OF THE REVENUE ACT OF 1932 AND THE REGULATIONS

The court below summarized its understanding of a taxable gift under the revenue laws in the following language (R. 58):

> What she surrendered in good faith was of quite substantial value in money's worth and was a sufficiently real consideration in money's worth to negative a gift-motive concept in the excess in value of the property transferred. * * * This court has previously expressed, in the language of Judge Hamilton, its concept of the meaning

> of the word "gift" in the revenue statutes. *Commissioner of Internal Revenue* v. *Montague*, 126 F. (2d) 948, 951 (C. C. A. 6).

In the *Montague* case, the court below said (p. 951):

> The word "gift" is usually defined as a voluntary transfer of property by one to another without any consideration or compensation therefor. A "gift" is a gratuity and not only does not require consideration, but there can be none. If there is a consideration for the transaction, it is not a gift * * *.

However, in the *Montague* case, the question was whether the transaction was a gift or a payment of a debt, and Section 503 was not discussed. The language chosen by Congress in Section 503 makes plain that a gift can occur even though there is "consideration", and that, contrary to the holding of the court below, the statute means that valuable consideration in money's worth, tendered in good faith, shall, nevertheless, not negative a gift motive to the extent that the value of the property transferred exceeds the value of the consideration.

Moreover, even if its construction of the statute was correct, we contend that the court below erred by usurping the function of the Tax Court in making a finding of fact that the transfer here was a bargain or trade at arm's length free from any donative intent.

623289—44——3

A. *The transfer, pursuant to the antenuptial agreement, is "deemed a gift" to the extent that it was not supported by "an adequate and full consideration in money or money's worth."*—The terms "transfer" and "gift" are used, in Sections 501 and 503 of the Revenue Act of 1932, in their broadest and most comprehensive sense. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27 (1939–1 Cum. Bull. (Part 2) 457, 476); S. Rep. No. 665, 72d Cong., 1st Sess., p. 39 (1939–1 Cum. Bull. (Part 2) 496, 524); cf. *Smith* v. *Shaughnessy*, 318 U. S. 176; *Robinette* v. *Helvering*, 318 U. S. 184. Thus these gift tax provisions are not confined in their application to transfers of something for nothing, for if receipt of consideration by a transferor avoided a gift, as at common law, a ready means would have been afforded for frustration of the tax. Hence, Congress provided not merely that a tax be imposed "upon the transfer * * * of property by gift" (Section 501, Revenue Act of 1932, *supra*, p. 2), but further enacted, in Section 503 of that Act that:[1]

[1] A similar but more limited provision was also contained in the Revenue Act of 1924, c. 234, 43 Stat. 253, Section 320, enacting the first gift tax:

> Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

> Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Thus, the statute plainly contemplates the actuality of a "gift" despite the immediacy of "consideration" of "value"; simultaneously, "gift" and "consideration" may coexist; and though the transfer is one "for" the other, nevertheless, "for the purpose of the tax" the excess in value of the property transferred over such consideration is "deemed" a "gift". Cf. *Taft* v. *Commissioner*, 304 U. S. 351, 355–357. Long standing Treasury Regulations correctly mark out this statutory meaning. Thus, Treasury Regulations 79 explain:

> ART. 1. *Imposition of tax.*— * * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. (See article 8.) * * *
>
> ART. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable

> consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

On familiar principles these Treasury Regulations, long continued without substantial change,[2]

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[2] The language of Article 8 of Treasury Regulations 79, in the 1933 edition, was substantially the same as in the 1936 edition. It then read as follows:

> ART. 8. *Transfers for less than an adequate and full consideration.*—Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration constitutes a gift within the meaning of the statute. If the consideration is not reducible to a money value, as in the case of love and affection, promise of marriage, etc., it is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift. A sale, exchange, or other transfer of property

and applying to an unamended or substantially re-enacted statute, are deemed to have received Congressional approval and have the force of law. *Taft* v. *Commissioner*, 304 U. S. 351, 357; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Douglas* v. *Commissioner*, 322 U. S. 275, 281–282.[5]

In *Commissioner* v. *Greene*, 119 F. 2d 383, certiorari denied, 314 U. S. 641, with which the court below states that it is not in accord (R. 58), the Ninth Circuit Court of Appeals (at p. 386), held flatly that "donative intention is immaterial, because § 503 of the act in question does not re-

(see article 2) in the ordinary course of business, where the transaction is bona fide and at arm's length and free from any donative intent, shall be considered as made for an adequate and full consideration in money or money's worth.

In Treasury Regulations 108, Section 86.8, interpreting the same statutory language now found in the Internal Revenue Code, Section 1002, the language of the 1936 edition of Treasury Regulations 79, Article 8, is continued without change.

[5] The reports of the Congressional Committees, recommending adoption of the statute, read as follows (H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2) 457, 477–478); S. Rep. No. 665, 72d Cong., 1st Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 496, 525)):

> Since the tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000.

quire it." It is unnecessary, however, for this Court to decide whether or not a donative intent is completely immaterial in all situations. The Treasury, by the authoritative construction contained in its Regulations already quoted, has excluded "bad bargains" made in the ordinary course of business (Article 8, Treasury Regulations 79):

> However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth.

In any event, when a transaction is essentially a family settlement and involves no bargain or *quid pro quo*, the statute and regulations assume a gift and do not require express proof of donative intent. Certainly the regulations do not broaden the statute; if anything they limit it.[4] Indeed, this Court in *Robinette* v. *Helvering*, 318 U. S. 184, 187–188, has recently construed, ap-

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[4] Thus, in II Paul, *Federal Estate and Gift Taxation*, Sec. 16.14, p. 1113, it is stated:

> It is assumed in the regulations that if a transfer is not "made in the ordinary course of business," as defined by the Treasury, the lack of "an adequate and full consideration in money or money's worth" should dispose of any assertion that the transferor lacked donative intent.

For further discussion of the meaning of the statute and Regulations in this connection, see II Paul, *id.* at Sections 16.14–16.15.

plied, and by implication approved Article 8, in holding that a family settlement fell without "the permissive scope of Art. 8 of Regulations 79 (1936 edition)", since it did not constitute a transaction "in the ordinary course of business".

We think it quite clear that the transaction here was a family settlement rather than a bargain or trade. The Tax Court found that the only consideration for the instant transfer was a promise of marriage (R. 13, 14), which, under Article 8 of the Regulations, "is to be wholly disregarded". Moreover, in the language of the Tax Court (R. 15):

> Even if it be assumed that the loss by his wife of the income of the trusts was a consideration for the transfer of the stock rather than a mere consequence of the marriage,

the transaction does not fall within the permissive scope of Article 8, as made in the ordinary course of business, nor—from a broader aspect—is it in any sense an arm's length commercial transaction at all, free from any donative intent—whether within or without the ordinary course of business. The taxpayer did not bargain for a wife, nor did he bargain for the loss of trust income, valued at $77,500, in exchange for his transfer of $149,456.13 worth of stock.

The transfer of the stock was not in payment for either the promise of marriage or the financial detriment incurred as a consequence of marriage.

In the language of the agreement itself, drawn by Mrs. More's father, it was taxpayer's desire "to compensate" her (R. 10) "for her aforesaid loss and to provide for and maintain her so long as she may live in keeping with her station in life;" namely, as his wife. As a consequence of the marriage she would suffer a financial loss. He did not desire this to ensue and he wished to make ample provision for her anyhow; therefore, he gave her approximately twice the value of what she would lose by marriage, but his transfer was not in payment for what she lost any more than it was in payment for her consent to become his wife. Besides, it will be recalled that the trust income was here not, as a matter of fact, lost to the family, but instead of being paid partly to Mrs. More, upon her remarriage inured entirely to her son.

The great disparity between the value of the trust interests surrendered and the value of the stock transferred is, in itself, striking evidence that the transaction was a family settlement, a division of a substantial estate—not a bargain at all. Further confirmation is afforded by the provisions of taxpayer's will executed on the wedding day, wherein he gave Mrs. More an estate for life or widowhood in a farm and one-third of his estate in trust, *allowing, however, for the approximate value of the stock transferred* (R. 11). Hence, the antenuptial agreement was in reality only one step in the entire family set-

tlement and in the eventual distribution of his entire estate.

Since valuable property interests are involved, the agreement, marriage, and will may, indeed, possess an economic or business aspect. However, this is commonly one of the aspects of marriages and wills, which thereby do not become transactions entered into in the ordinary course of business or business transactions at all. Nor is the circumstance that the agreement was drawn by a lawyer significant. Legal advice is customarily obtained where substantial property settlements are involved, and here the lawyer was Mrs. More's father, who might be expected to advise in a family settlement of this character. Again, the circumstances, that she was unwilling to marry him unless he compensated her for the loss of the trust income and that through this transaction taxpayer satisfied a desire for her to become his wife, do not characterize this family settlement as a commercial transaction or a trade (in or out of the ordinary course of business); as this Court has pointed out, in connection with the income tax law, the motives for a gift need not be altruistic or purely generous; indeed they may often be business or selfish. Cf. *Helvering* v. *Amer. Dental Co.*, 318 U. S. 322, 330–331. The Circuit Court of Appeals for the First Circuit characterized a transfer much like that here involved as "a purely business transaction", but nevertheless held it taxable as a gift. *Commissioner* v. *Bristol*, 121 F.

2d 129, 131. Indeed, Treasury Regulations interpreting the income tax provide that the amount of principal paid under a marriage settlement is a gift. Treasury Regulations 103, Sec. 19.22 (b) (3)–1.

In *Merrill* v. *Fahs*, No. 126, this Term, set for hearing at the same time as the instant case, the Fifth Circuit Court of Appeals held a transfer under a similar antenuptial agreement to be taxable as a gift. Situations such as were involved in *Lasker* v. *Commissioner*, 138 F. 2d 989 (C. C. A. 7th), and *Jones* v. *Commissioner*, 1 T. C. 1207, are readily distinguishable. There, a husband and wife were taking steps to secure a divorce and the settlement of the wife's right to support and her property claims against him were at issue. While we think the Regulations were not intended to exclude even that type of transaction, the parties were dealing at arm's length, in a sense, and the purpose to trade may have been said to exist. Thus, in the *Jones* case, the Tax Court expressly differentiated antenuptial agreements such as here involved, and said (p. 1210):

> Moreover in those cases the circumstances are frequently such that there may well be a definite donative intent in the transfer. The contract there may be to effect a mere family arrangement. The parties are manifestly not dealing at arm's length and the purpose to exact a *quid pro quo* may be lacking.

Indeed, in the *Lasker* case, it appears (p. 991) that the court understood that the Commissioner there conceded that the transaction in question was made in the ordinary course of business, at arm's length, within the exception contained in Article 8 of Regulations 79.[3] By contrast, the situation at bar, as already pointed out, bears close analogy to that involved in *Robinette* v. *Helvering*, 318 U. S. 184, 187–188, where, by agreement, mother and daughter executed reciprocal trusts and the stepfather made a similar arrangement by will. There taxpayer's contention that this agreement came within the regulations as an arm's length transaction in the ordinary course of business was overruled by this Court.

B. *Implicit in the decision of the Tax Court is a finding that the transfer was "donative", but if the court below properly considered an express finding to that effect essential, it should have remanded the case to the Tax Court.*—Even if we are wrong in our conclusion, already stated, respecting the correct construction of Section 503, we submit that the court below went beyond its powers in holding that "there was no donative intent in the transfer sought to be taxed as a gift" (R. 57).

Study of the opinion of the Tax Court (R. 8–16) reveals the inaccuracy of saying, as did the court

[3] As a matter of fact, the Government did not intend such a concession.

below (R. 56), that "The tax court itself found no evidence of an actual donative intent upon the part of petitioner in transferring the stock." The Tax Court's holding that the promise to marry was valuable consideration at common law for the antenuptial agreement is certainly not a finding that there was "no evidence of an actual donative intent", for donative intent on the part of the promisee is completely consistent with such a promise. While the Tax Court did not expressly find, for reasons amplified in the preceding section of this brief, that the transfer was made with or without donative intent, there is implicit in its opinion and the facts it did find its view that the transfer was donative. The Tax Court noted the impossibility of valuing marriage in terms of money (R. 13); the discrepancy, amounting to $72,000, between the value of the stock transferred by taxpayer and the detriment suffered by the transferee (R. 12); and that taxpayer's (R. 16)—

> argument that the "detriment" suffered by his wife was consideration for the transfer even though it did not result in any financial gain to him loses much of its force when it is kept in mind that the income, which she would have received under the trusts, inured wholly to her infant son. It may well be, though we make no holding to that effect, that her maternal instinct prompted her to take the step which would

> give him double assurance of an adequate income for life.

Certainly the record contains ample evidence to sustain a finding that the transaction was a family arrangement, made with donative intent, not a business deal or bargain, at arm's length. Such a finding, implicit in the findings and opinion of the Tax Court, is entitled to finality. *Dobson* v. *Commissioner,* 320 U. S. 489, rehearing denied, 321 U. S. 231; *Commissioner* v. *Scottish-American Investment Co.,* decided by this Court, December 4, 1944.

Going beyond its powers in entering into such an inquiry, the court below found that the prospective wife bargained "at arm's length" (R. 56), that the transaction was "business-like" in nature (R. 56), that the consideration for the transfer was not only a promise to marry, as the Tax Court had found (R. 13, 14), but also "a concomitant surrender by the transferee of a life income in an existing trust fund" (R. 56) and that (R. 57)—

> She was agreeing upon a present transfer made to indemnify her against loss of existing property rights which would ensue in consequence of her remarriage.

The court below also chose to infer that the transfer was completely disassociated from any indicia of an intent to avoid death taxes, that the minds of the contracting parties were not upon the effect of the transfer in the event of the death of

either (R. 57), and finally, found that there was no donative intent in the transaction and held that the case was "*sui generis*, easily and correctly justiciable" (R. 57) upon this ground. This was not a necessary inference from the record, and it cannot be said that no other conclusion had substantial basis in the evidence and that a finding of donative purpose could not have been sustained on this record. On the contrary, we urge that a finding of donative intent is implicit in the Tax Court's finding and in the facts found by it and that the evidence supplies a substantial basis for such a finding. But if it be held that the Tax Court failed to make a finding essential for the disposition of the case, it is submitted that it was error for the Circuit Court of Appeals, in the first instance, itself to appraise and weigh the evidence and decide this factual question of intention. Instead, the case should have been remanded to the Tax Court with directions to that tribunal to make a finding of fact as to donative intent. *Helvering* v. *Rankin*, 295 U. S. 123, 131; *Commissioner* v. *Scottish-American Investment Co., supra; Fulton Oil Co.* v. *Commissioner*, 81 F. 2d 330 (C. C. A. 9th); *Rosenthal* v. *Helvering*, 124 F. 2d 474, 477 (C. C. A. 2d); *Levitt & Sons* v. *Nunan*, 142 F. 2d 795, 798 (C. C. A. 2d).

II

TAXPAYER FAILED TO PROVE THAT HE RECEIVED ANY ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH FOR THE GIFT, AND, ACCORDINGLY, THE ENTIRE VALUE OF THE PROPERTY TRANSFERRED IS TAXABLE

Since the court below construed the statute as barring taxation of the transfer here involved as a gift, it regarded as unnecessary a calculation of the excess in value between what taxpayer conveyed to his prospective wife and that which she lost in money or money's worth (R. 57). If, however, the transfer was not excluded from Section 503 as a business or arm's length transaction, a determination as to whether any consideration was given for the transfer, and a calculation of the difference between what taxpayer gave and the value of the consideration becomes essential in order that the excess may be taxed. It was the holding of the Tax Court and it is our contention here that the taxpayer failed to prove the value of the alleged consideration; namely, the actual value of the wife's interest under the trust; and that, even if the value of that interest had been established, its loss does not in any event constitute "adequate and full consideration in money or money's worth" within the meaning of Section 503, and the total value of the transferred property is the measure of the gift.

A. *Taxpayer failed to prove the value of the consideration.*—The Tax Court correctly ruled that taxpayer failed to prove the value of his prospective wife's interest under the trusts created by her former husband (R. 15–16). The corpus of these trusts consisted of 670 shares of the capital stock of the Arcade Company, of Nashville, Tennessee (R. 9). Mrs. More was entitled to one-half of the income earned by these trusts from the death of her first husband until her death or remarriage (R. 9). The other half of the income was for the maintenance and support of the child of the marriage (R. 9); upon her remarriage the entire income inured wholly to her infant son (R. 11). Her first husband died on February 9, 1934, and between that date and June 20, 1939, the date of her remarriage to taxpayer, she received a total of $29,428.89 (R. 9–10). This averaged $5,484 a year. Upon the basis solely of this average annual income, Mrs. More's age (44 years) at the time of her marriage to taxpayer, and by use of mortality tables, the taxpayer attempted to establish that the value of the wife's interest in the income of these trusts was $77,500. (R. 12.) The Tax Court found this evidence insufficient as proof of actual value of the wife's interest under the trusts. We submit that on the basis of this evidence the Tax Court not only was not compelled to make a finding as to the value of her interests in the trusts, but that such a finding would have had no substantial basis in the record.

No evidence whatsoever as to the financial condition of the Arcade Company or of the assets owned by it was adduced (R. 16). The value of the wife's interest in the trust income depended exclusively upon the success of the company, since the instruments gave the wife not an annuity for life but merely a part of the income earned by this stock and distributed to the trusts as dividends, and since, under the trust instrument, the Arcade stock could not be sold (R. 33, 43). In fact, this income, for the five years experience proved, varied in some years by as much as 20% (R. 9). There is no assurance at all that the income will continue at the average rate. The dividend policy of the corporation may change by necessity or otherwise. While the actuarial tables may be assumed to afford a sufficient basis for ascertaining her life expectancy, only five years' history of the income of this company certainly afforded no basis at all for a determination of its earning powers for the life expectancy of a woman 44 years of age. Apparently the Arcade Company was a closed corporation in which the wife's first husband, E. L. More, was interested. The nature of the management, its future prospects, its present financial condition, the kind of business it was in, the character of the assets owned by it, the necessity of continued management in the same hands for business success, as well as the sale price of the stock, were all essential factors in determin-

ing the amount and probability of income for any considerable number of years in the future. The dividend policy of the corporation is also a relevant factor. Cf. *Couzens* v. *Commissioner*, 11 B. T. A. 1040, 1172. The issue here is not merely earnings for a brief period, but net worth and permanent dividend-paying capacity. In substance, no evidence was introduced except a mathematical calculation based on uncertain and incomplete facts. The income and dividend history could certainly have been proved for a longer period. Treasury Regulations 79 (1936 ed.), Article 19, as amended by Treasury Decision 4901, 1939–1 Cum. Bull. 341, entitled "Valuation of Property", sets forth the necessary elements to establish the value of a security on the basis of the earning power of stock such as that which formed the corpus of this trust. This regulation provides that where selling price is not available, the basis shall be—

> the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon which the donor bases his valuation should be submitted with the return.

While this regulation is directed towards valuing stock which is the subject of a gift, it is no less relevant in determining the value of a right to

receive income arising from the ownership of stock. The same factors must be considered in determining the money's worth of consideration received by a donor from a donee, pursuant to Section 503. The burden of proving the value of the consideration was on the taxpayer. See *Housman* v. *Commissioner,* 105 F. 2d 973 (C. C. A. 2d), certiorari denied, 309 U. S. 656. In *Universal Steel Co.* v. *Commissioner,* 46 F. 2d 908, 909 (C. C. A. 3d), the court said that this burden can be met:

> only by satisfactory proof of error and not by a mathematical calculation in which some of the essential factors are uncertain.

We submit that the factors necessary for a valuation of the alleged consideration are lacking here and that the Tax Court was not required to find that the wife's interest in the trust income had a value of $77,500, or any other amount. Its conclusion that its value had not been established has a substantial basis in the record and must be accepted. *Commissioner* v. *Scottish-American Investment Co., supra.* This is not a case where the Tax Court has followed a wrong theory of valuation (*Guggenheim* v. *Rasquin,* 312 U. S. 254), but a case where the Tax Court has declined to apply a theory of valuation which would determine the value of the wife's interest only if the wife had been entitled to receive $5,484 from the trust each year.

Obviously, moreover, this is not a case where taxpayer made the best showing possible under the circumstances and adduced, to a reasonable extent, all the proof available. On the contrary, it is apparent that readily available proof was not adduced and the Tax Court was entirely correct in ruling that under the circumstances it was not compelled to rely upon speculation and conjecture. *Guggenheim* v. *Helvering*, 117 F. 2d 469 (C. C. A. 2d), certiorari denied, 314 U. S. 621, on which respondent relied below, is therefore, readily distinguishable. So also is *Helvering* v. *Taylor*, 293 U. S. 507, also relied upon by respondent, for in that case no opportunity had been afforded taxpayer to adduce evidence before the Board and to try the case on its merits and on the correct theory; only for that reason was a rehearing deemed necessary.

In *Archbold* v. *Commissioner*, 42 B. T. A. 453, 456, where the taxpayer also claimed to set off consideration received as against a gift, the Board said:

> The record shows the ages of Archbold, his intended wife, and his mother. The record does not show or give data from which may be computed the value in money or money's worth on December 31, 1936, or immediately after the marriage, of Elizabeth's rights in Archbold's estate which she agreed to surrender. *Fish* v. *Helvering*, 75 Fed. (2d) 769, affirming 27 B. T. A.

> 1002. * * * We have no idea of and no way of measuring the value on December 31, 1936, or thereabouts of such surrender as she made in consideration of the transfer of the $10,205.62. We can not say that the petitioner erred in paying the gift tax on the transfer of the $10,205.62.

B. *The detriment suffered by Mrs. More cannot, as a matter of law, constitute "adequate and full consideration in money or money's worth."*—The loss of the wife's interest in the trust income cannot as a matter of law constitute "adequate and full consideration in money or money's worth" within the meaning of Section 503 of the Revenue Act of 1932. The Tax Court found that taxpayer received no property of any sort in the transaction. All that he received was her promise to marry him, which is not measurable in money or money's worth. (R. 13.) As the Tax Court noted, the contention that the detriment suffered by her was consideration for the transfer, even though it did not result in any financial gain to him, loses much of its force when it is kept in mind that the income which she would have received under the trusts was not lost to the family, but after the marriage merely inured wholly to her son, and that thereby she afforded him double assurance of an adequate income for life (R. 16).

But even if this were not true, detriment to the donee is not the kind of consideration referred to

in Section 503. For reasons previously indicated the statute was not concerned with consideration in a common-law sense. Its obvious purpose was to reach certain transfers which by common-law standards might be deemed sales or exchanges, provided the donor had not received an adequate and full consideration in money or money's worth. The meaning of "consideration" in Section 503 is well stated by the First Circuit Court of Appeals in *Commissioner* v. *Bristol,* 121 F. 2d 129, 133–134:

> Section 503, providing that a transfer shall be deemed a gift unless the transferor receives full and adequate *consideration* in money or money's worth, appears to mean that any transfer of property is to be treated as a gift to the extent that the transferor does not receive in return an adequate and full *equivalent* in money or something which can be valued in money. "Consideration", as used in Section 503, is not the same as common law consideration; it means that when the transferor gives something away and does not at the same time replace it with money of equal value or some goods or services capable of being evaluated in money, he is deemed to have made a gift within the taxing law. * * * To our mind, the purpose of this section in the gift tax statute and similar wording in sections of the federal estate tax law was to prevent the depletion of the transferor's or decedent's estate, unless a tax was paid on

the transfer, by requiring that the transferor or decedent receive in exchange something of the same money value.

The meaning of the term is here not to be determined by common law or local law, but from the purpose of the federal legislation. *Commissioner* v. *Greene,* 119 F. 2d 383, 385–386 (C. C. A. 9th), certiorari denied, 314 U. S. 641.

The parallel provision (Section 320) of the 1924 Act, note 1, *supra,* p. 14, seemed to require that the consideration be received by the transferor, since the gift was defined to be "the amount by which the fair market value of the property exceeded the consideration *received*". (Italics supplied.) The present law does not use the word "received" but it does refer to a transfer for less than an adequate consideration in money or money's worth, and there is no indication that Congress meant to exclude transfers that would have been taxed under the Revenue Act of 1924. Rather its purpose was to make the statute as comprehensive as possible. H. Rep. No. 708, 72d Cong., 1st Sess., p. 27 (1939–1 Cum. Bull. (Part 2) 457, 476). A construction of the statute which would permit a transfer to escape the tax merely because the donee suffered a detriment would not serve that purpose. Congress obviously wished to narrow possible exclusions under the phrase "fair consideration in money or money's worth" used in Section 320 of the Revenue Act of 1924, just as it had sought by amendments to the estate tax law

to narrow the class of deductible claims. *Taft* v. *Commissioner*, 304 U. S. 351, 357. To hold that the statute fails to reach transfers which in no way diminish the taxpayer's estate would be inconsistent with the policy of the statute. See II Paul, *Federal Estate and Gift Taxation*, Sec. 16.14, p. 1114, in which the author agrees with this view and urges that the adoption of a contrary view—

> for gift tax purposes would open the way for easy avoidance of the tax, and it is therefore extremely doubtful whether the Supreme Court would ultimately sanction such an interpretation.

Where the purported consideration does not replenish the transferor's estate or grant him any right which he did not possess before, it is not within the meaning of the gift tax law "adequate and full". Compare cases ruling on the meaning of "consideration" in connection with deductible claims under the estate tax. *Taft* v. *Commissioner*, 304 U. S. 351, 357; *Latty* v. *Commissioner*, 62 F. 2d 952, 954 (C. C. A. 6th); *Glaser* v. *Commissioner*, 69 F. 2d 254, 257 (C. C. A. 8th), certiorari denied, 292 U. S. 654; *Estate of Gray* v. *Commissioner*, 44 B. T. A. 545, 548–549. Taxation has often been said to be a practical matter; the primary purpose of the gift tax is to prevent the depletion of the donor's estate unless he receives in exchange something of equivalent money value. The construction adopted by the Tax

Court here is in consonance with this purpose, particularly since the alleged "detriment" was a means by which this mother provided a double income for her son.

III

SECTIONS 501 AND 503 OF THE REVENUE ACT OF 1932, AS CONSTRUED BY THE TAX COURT, ARE CONSTITUTIONAL

In the Tax Court, taxpayer contended that an interpretation of Sections 501 and 503 taxing the transfer in the instant case would violate the Fifth Amendment to the Constitution. The Tax Court overruled this contention (R. 14–15), and the Circuit Court of Appeals, in view of its interpretation of Section 503, found it unnecessary to consider taxpayer's argument that (R. 57)—

> should the statute be construed as arbitrarily taxing bona fide transfers for a valuable consideration when not in fact gifts nor intended or capable of being employed to evade the gift tax, the section would be violative of the Fifth Amendment to the Constitution of the United States. Heiner v. Donnan, 285 U. S. 312.

The petitioner's argument relates solely to the matter of classification. It is not contended that Congress could not constitutionally impose a transfer tax upon the transfer here involved, even if the transaction were one made in the ordinary course of business, and no such contention can

logically be made in view of such decisions as *Nicol* v. *Ames,* 173 U. S. 509, and *United States* v. *Hudson,* 299 U. S. 498. The contention is that the transaction here may not be classified as a gift, and the argument assumes that a prenuptial agreement made for a valuable consideration could not be used for the purpose of avoiding a gift or estate tax, an assumption that cannot logically be made. Moreover, the question is not whether this particular transaction was employed to avoid the tax, but whether Congress, as a means of making effective a tax on gifts and estates, might classify as gifts transfers made pursuant to family arrangements where the transfer was not made for a full and adequate consideration in money or money's worth. Cf. *Taft* v. *Bowers,* 278 U. S. 470; *Helvering* v. *City Bank Co.,* 296 U. S. 85, 90, rehearing denied, 296 U. S. 664; *Tyler* v. *United States,* 281 U. S. 497.

Unless it can be said that the classification is wholly arbitrary and capricious, there is no violation of the Fifth Amendment in making the classification. *Barclay & Co.* v. *Edwards,* 267 U. S. 442. Congress may adopt any measure reasonably calculated to prevent avoidance of the gift and estate tax and the test of validity with respect to the Due Process Clause is merely whether the means adopted are appropriate to the end. Thus, this Court held in *Helvering* v. *City Bank Co., supra* (p. 90):

> A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. * * *

The Tax Court's application of the statute to the instant controversy does not involve, as often pointed out, the taxing of a commercial transaction, that is, a bargain in or out of the ordinary course of business. The facts at bar present only a family settlement and the distribution of a substantial estate. (See Point I, *supra.*) The record clearly indicates that taxpayer so regarded it, for in drawing his will he took into account the distribution already made to his wife. Unless the tax is imposed upon this transfer, it will escape tax altogether. In language often quoted, this Court has said (*Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 44):

> The gift tax was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet* v. *Guggenheim, supra,* 286. An important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.

Obviously a transfer to a prospective wife which is not made in the ordinary course of business and is not made for an adequate and full consideration in money or money's worth is sufficiently like a common-law gift to be classified with such gifts for tax purposes, particularly when the end in view is to make effective a transfer tax on donative transfers.

CONCLUSION

The decision of the Circuit Court of Appeals for the Sixth Circuit should be reversed and the decision of the Tax Court reinstated.

Respectively submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
I. HENRY KUTZ,
Special Assistants to the Attorney General.

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